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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 738

GENERAL MOTORS CORPORATION (As Transferee in Complete Liquidation of Walter J. Bemb, Inc.),
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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Note.—For other citations see index and brief in petition filed simultaneously herewith in *United Motor Service, Inc.*, v. *United States*, incorporated in this petition by reference.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

The petitioner, by its attorney, prays that a writ of certiorari issue, to review the judgment of the Court of Claims of the United States entered in this case on November 12, 1940, sustaining respondent's demurrer and dismissing petitioner's petition.

Opinion Below.

The opinion of the Court of Claims (R. 21-27) is reported in 35 F. Supp. 466.

Jurisdiction.

The judgment of the Court of Claims of the United States was entered on November 12, 1940 (R. 27). The jurisdiction

of this Court is invoked under the Act of February 13, 1925 (c. 229 #3, 43 Stat. 936), as amended by the Act of May 22, 1939 (c. 140, 53 Stat. 752).

Questions Presented.

1. Whether Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934 imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

2. Whether said Sections of said Act, impose a direct tax in violation of Art. I, Sec. 2, Subd. 3, and Art. I, Sec. 9, Subd. 4, of the Constitution of the United States.

Statutes Involved.

This will be found in the Appendix, *infra*, pp. 8-10.

Statement.

The facts as set out in the amended petition, and as admitted by respondent's demurrer (R. 21) are substantially as follows:

This is a suit against the United States for the recovery of capital stock taxes paid by the petitioner for the years ended June 30, 1933, and June 30, 1934 (R. 1-2) and is based upon the ground that Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934, are unconstitutional (R. 8-12).

The petitioner, General Motors Corporation, is a Delaware corporation, with its offices and principal place of business at Detroit, Michigan. Walter J. Bemb, Inc., was a Delaware corporation, organized on May 5, 1933, with an authorized capital stock of 2,000 shares of Class A common stock of the par value of $75 per share and 6,000 shares of

Class B common stock of the par value of $25 per share. Walter J. Bemb, Inc., commenced to do business on May 20, 1933, and engaged in the business of selling automobiles, parts, and accessories, and the servicing of automobiles (R. 3). The outstanding capital stock of Walter J. Bemb, Inc., during its corporate existence, was as follows: Immediately after organization—1,093 shares of said Class A common stock; at December 31, 1933—1,480 shares of said Class A common stock; at December 31, 1934, and until the date of the dissolution on June 27, 1935—1,813 shares of said Class A common stock (R. 3).

The outstanding common stock was wholly owned and paid for in cash by General Motors Holding Corporation, a subsidiary of General Motors Corporation, petitioner herein (R. 3). On June 27, 1935, Walter J. Bemb, Inc., transferred its assets to its parent company, General Motors Holding Corporation, in cancellation of the outstanding shares of its capital stock, and on June 27, 1935, Walter J. Bemb, Inc., was dissolved. Subsequently, on November 30, 1936, General Motors Holding Corporation transferred its entire assets to its parent company, General Motors Corporation. At or about the same time, General Motors Holding Corporation was dissolved (R. 2).

The net sales, gross profit and net losses of Walter J. Bemb, Inc., for the period from May 20 to December 31, 1933, for the calendar year 1934, and for the period from January 1, 1935, to June 27, 1935, were (R. 3):

	Net Sales	Gross Profit on Sales	Net Losses
May 20 to December 31, 1933	$1,190,057.26	$197,285.71	$11,653.18
Calendar Year 1934	1,298,092.16	191,470.21	22,817.46
January 1, 1935, to June 27, 1935	395,424.92	53,522.05	11,606.34

The net worth of Walter J. Bemb, Inc., according to its books of account as at the time of the filing of its capital stock tax returns for the year ended June 30, 1933, and the year ended June 30, 1934, and as at June 27, 1935, was (R. 3-4):

At the time of filing capital stock tax return, June 30, 1933	$111,000.00
At the time of filing capital stock tax return, June 30, 1934	101,463.38
At June 27, 1935	95,020.17

Prior to the time for filing of the capital stock tax return for Walter J. Bemb, Inc., for the year ended June 30, 1933, the persons charged with the responsibility of determining the value to be declared for capital stock tax purposes gave consideration to the question. It was estimated that earnings of 30% on invested capital could be expected during very good business years. It was known that during the four preceding years of the depression period some dealerships in Detroit, Michigan, earned nothing on investments therein. However, it was hoped that business conditions would improve and in order to leave a margin of safety it was determined to declare a value which would permit net earnings of approximately 50% on the invested capital in any year without incurring any liability for excess-profits tax. The invested capital at this time was $111,000.00 and the value to be declared was determined at $500,000.00. The same method was used in determining the value to be declared for the year ended June 30, 1934. At the time the declared value for capital stock tax purposes was determined for the year ended June 30, 1934, the invested capital of Walter J. Bemb, Inc., was $135,975.00 and the declared value was determined at $544,000.00 (R. 4).

Specification of Errors to be Urged.

The Court of Claims of the United States erred:

1. In failing to hold that Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934, imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the Due Process Clause of the Fifth Amendment.

2. In failing to hold that said Sections of said Acts impose a direct tax in violation of Art. I, Sec. 2, Subd. 3, and Art. I, Sec. 9, Subd. 4, of the Constitution of the United States.

3. In sustaining the respondent's demurrer and dismissing petitioner's petition.

Reasons for Granting the Writ.

1. The Court of Claims of the United States in this case has decided an important constitutional question, which has not been, but should be, settled by this Court.

2. The decisions of the lower Courts are in conflict on the question as to whether the value of the capital stock required to be declared by the Acts in question, must have some reasonable relationship to actual or fair value, or whether the declared value is binding on the taxpayer regardless of actual or fair value.

a. In *Oertel* v. *Glenn,* 13 F. Supp. 651, the District Court (W. D. Ky.), in passing upon the capital stock tax provisions of the N. I. R. A., said—"If the Act here in question is construed to raise a conclusive presumption that the tax is to be levied on the declared value of the taxpayer, regardless of the actual value, it is violative of the Fifth Amendment." In *Allied Agents* v. *The United States,* 26

F. Supp. 98, the Court of Claims held that "the actual value is immaterial." In *Kentucky Fire Brick Co.* v. *Glenn,* 34 F. Supp. 35 (W. D. Ky.), the Court expressly rejected the interpretation of the Court of Claims and held "that the purpose of the Act is to impose a tax based on the fair and reasonable value of the stock, rather than upon an arbitrary value fixed by the taxpayer." In the instant case, the Court of Claims held that "while the statute did not require the use of the actual or fair value of the stock, the intent of the statute was that a fair valuation should be stated." In *Oertel* v. *Glenn,* 97 F. (2d) 495, the Sixth Circuit Court of Appeals held that "it is the intent of the statute that constitutes the law."

3. The Court of Claims has decided an important constitutional question in a way probably in conflict with applicable decisions of this Court.